(1) Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

COLLINS ENTERTAINMENT, INC. and
192 COIN-OPERATED VIDEO GAME MACHINES, etc., *et al.*,

Petitioners,

v.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
and THE STATE OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state procedure permitting the seizure and destruction of private property without any opportunity – before or after the seizure – for the property owner to present evidence and to challenge the state's fact-finding, violate the Due Process Clause of the Fourteenth Amendment?

STATEMENT PURSUANT TO RULE 29.6

Collins Entertainment, Inc. owns the property at issue in this case. No parent company and no publicly held company owns 10% or more of its stock.

The complete description of the property in the caption of the Court below does not appear in full on the cover page, and continues as follows:

> . . . SAID MACHINES BEARING SERIAL NUMBERS AND I.D.NUMBERS LISTED ON THE ATTACHMENT, BEING THE PROPERTY OF COLLINS ENTERTAINMENT CORPORATION LOCATED AT 1341 RUTHERFORD ROAD AND THE BRANDON MILL STORAGE FACILITY, AND 23 COIN-OPERATED VIDEO GAME MACHINES, SAID MACHINES BEARING SERIAL NUMBERS AND I.D. NUMBERS LISTED ON THE ATTACHMENT, BEING THE PROPERTY OF COLLINS ENTERTAINMENT CORPORATION LOCATED AT 1341 RUTHERFORD ROAD AND THE BRANDON MILL STORAGE FACILITY

TABLE OF CONTENTS

Question presented i
Statement pursuant to Rule 29.6 ii
Table of authorities iv
Opinions below 1
Statement of jurisdiction 1
Constitutional provision involved 1
Statement of the case 2
Reasons for granting the writ 7
The decision below conflicts with this Court's procedural due process jurisprudence 7
Conclusion 11
Appendix
A – Feb. 7, 2000 Opinion of the Supreme Court of South Carolina 1a
B – June 9, 1998 Order of South Carolina Court of Common Pleas, 13th Judicial Circuit, affirming Order of Destruction (No. 98-CP-286) 32a
C – March 4, 1998 Order of South Carolina Court of Common Pleas, 13th Judicial Circuit, affirming Order of Destruction (No. 98-CP-23-22) 36a
D – Jan. 21, 199[8] Magistrate's Order of Destruction (23 machines) 50a
E – Dec. 31, 1997 Magistrate's Order of Destruction (192 machines) 52a
F – Mar. 9, 2000 Denial of Rehearing by Supreme Court of South Carolina 54a
G – Feb. 6, 1998 Affidavit of Fred Collins 56a

TABLE OF AUTHORITIES

Cases **Page**

Armstrong v. Manzo, 380 U.S. 545 (1965) 7

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 6, 8

Gilbert v. Homar, 520 U.S. 924 (1997) 9

Goss v. Lopez, 419 U.S. 565 (1975) 9, 10

Grannis v. Ordean, 234 U.S. 385 (1914) 7

Greene v. McElroy, 360 U.S. 474 (1959) 8

Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977) 5

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 9

Mathews v. Eldridge, 424 U.S. 319 (1976) 7

Morrissey v. Brewer, 408 U.S. 471 (1972) 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7

State v. Kizer, 164 S.C.383, 162 S.E. 444 (1932) 2, 3, 5, 6, 9

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 8

Wolff v. McDonnell, 418 U.S. 539 (1974) 9

Constitutional Provision

Fourteenth Amendment, U.S. Const. (Due Process Clause). 1

Statutes

28 U.S.C. § 1257(a) 1
S.C. Code Ann. § 12-21-2712 (Supp. 1998) 4, 5
S.C. Code Ann. §§ 12-21-2770
et seq. (Law. Co-op. 1997) 2
S.C. Code, § 18-7-130 6

OPINIONS BELOW

The opinion below of the Supreme Court of South Carolina is reported at 338 S.C. 176, 525 S.E.2d 872 (2000). It is reproduced in the Appendix at App. 1a-31a. Rehearing was denied in an unpublished order. App. 54a. The unpublished orders of the Court of Common Pleas and the Magistrates' Destruction Orders are reproduced in the Appendix at App. 32-53a.

STATEMENT OF JURISDICTION

Judgment was entered by the Supreme Court of South Carolina on February 7, 2000. App. 1a. Rehearing was denied on March 9, 2000. App. 54a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, U.S. Constitution
(Due Process Clause)

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Collins Entertainment, Inc. is licensed by the State of South Carolina to own and operate video game machines under the South Carolina Video Games Machine Act, S.C. Code Ann. §§ 12-21-2770 *et seq.* (Law. Co-op. 1997).[1]

On December 22 and 23, 1997, South Carolina Law Enforcement Agents executed a search warrant at Collins' property and seized 192 video game machines, asserting that those machines were not legal under South Carolina law. A second seizure, involving 23 machines, occurred on January 14, 1998. A magistrate attended each seizure at Collins' property, examined the machines, declared them illegal, and filed an Order of Destruction. App. 50a-53a. No opportunity to be heard preceded this process. Indeed, Collins' attorney was told, "you don't have a right to say anything." Record on Appeal, p. 251.

Collins sought review of each Destruction Order in Greenville County Court of Common Pleas by filing exceptions triggering appellate review. Those exceptions presented the federal due process question addressed by the Supreme Court of South Carolina. The circuit court judge affirmed both of the magistrates' orders. He rejected the due process claim, quoting the Supreme Court of South Carolina's decision in *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932):

---

[1] Collins Entertainment, Inc. is thus the Petitioner in this petition. The Supreme Court of South Carolina adopted the same approach. App. 2a, n. 1.

In *Kizer*, the Court stated:

> there is no doubt that the procedure outlined in section 3 is very drastic and summary. It provides that the machine may be taken before a magistrate, who shall examine the same, and if he comes to the conclusion that the machine is a gambling device, then he may order it to be summarily destroyed. There is no provision for the defendant to test the accuracy or wisdom of the magistrate's decision. It is certainly a drastic remedy. But, when we take into consideration the evil which the statute seeks to remedy, we do not think that it violates the due process clause of the Fourteenth Amendment. (*Kizer*, at 449).

App. 42a.

The state agreed to stay the destruction of the machines pending review by the Supreme Court of South Carolina. The stay has been extended until the review process in this Court is finally resolved.

The Supreme Court of South Carolina consolidated the two destruction orders and rendered a single opinion affirming those orders. App. 1a. Collins presented several issues on appeal to the Supreme Court of South Carolina (App. 3a-4a), but only one of those issues is presented for review in this Court:

> Were Appellant's due process rights violated by the issuance of destruction orders without a hearing?
>
> A. Is the summary destruction authorized by the statute constitutional?
>
> B. If due process requires a hearing in this case, did Appellant receive one?

App. 4a (Issue III).

The court below recognized that the seizure and destruction of Collins' property without any opportunity to be heard would be violative of due process, and overruled its prior *Kizer* decision permitting that unconstitutional procedure to occur:

> Appellant's machines were seized pursuant to § 12-21-2712 of the South Carolina Code which mandates:
>
> > Any vending or slot machines, punch board, or other device pertaining to games of chance prohibited by § 12-21-2710 must be seized by any officer of the law and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if he is satisfied that it is in violation of § 12-21-2710 or any other law of this State he shall direct that it be immediately destroyed.

> S.C. Code Ann. § 12-21-2712 (Supp. 1998). A possible constitutional construction of a statute must prevail over an unconstitutional interpretation. *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E. 2d 331 (1977). We conclude the magistrate's examination of the seized machines under § 12-21-2712 must include an opportunity for the owner of the machines to be heard concerning their legality. We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality.

App. 22a-23a.[2]

Nevertheless, the court found "no due process violation in this case, however, because appellant has had the opportunity to be fully heard by both the circuit court and this Court." App. 23a.[3]

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[2] *Kizer* left no doubt that the magistrate proceedings were meaningless: "There is no provision for the defendant to test the accuracy or wisdom of the magistrate's decision." *Kizer*, 146 S.C. at 395, 162 S.E. at 449.

[3] An additional reason was that "appellant conceded the illegality of the machines in an affidavit, so it could not contest the magistrate's determination of illegality." App. 23a. But the affidavit to which the court referred did not refer to the specific property that was seized. A copy of the affidavit is included in the Appendix. App. 56a.

Likening this case to a forfeiture and citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974), the court held that Collins' "post-seizure opportunity to be heard fully satisfied the requirements of due process." App. 24a. The court concluded that the proceedings on appeal in the circuit court and the supreme court sufficed; that the lack of due process in the magistrate procedures was cured by the fact that Collin's "had the opportunity to be fully heard by both the circuit court and this Court." App. 23a.

That constitutional conclusion is belied by the South Carolina Supreme Court's acknowledgment that it did not have the power to make its appellate process meaningful, *vis a vis* the magistrate's findings:

> This Court cannot question findings of fact in a magistrate's court approved by a circuit judge on appeal when there is any evidence, however slight, tending to prove issues involved.

App. 5a. Nor, under South Carolina law, did the circuit court have the power to provide a constitutionally meaningful opportunity to be heard. State law provides that an appeal from a magistrate to the circuit court "shall be heard by the court upon all the papers in the case, including the testimony on the trial, which shall be taken down in writing and signed by the witnesses, and the grounds of exception made without the examination of witnesses in court." *See* South Carolina Code, Section 18-7-130. But there was no "trial" before the magistrate. Indeed, the circuit court judge acknowledged that the magistrate's Destruction Order was the only "evidence" to be considered: "I believe the case law and statutory authority

for this appeal is limited to the record to the magistrate's return, and of course I recognize you may wish to make further oral argument and cite cases in support of your position on appeal, but this is not a *de novo* hearing. I'm limited to the record before the magistrate." Record on Appeal, p. 347.

It is against that background – the decisiveness of the magistrates' findings made in acknowledged violation of any meaningful opportunity to be heard, and a review process that could not re-visit those findings – that certiorari is sought.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PROCEDURAL DUE PROCESS JURISPRUDENCE

The applicable due process principles are simple: "The fundamental requisite of due process of law is the opportunity to be heard. . . ." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The opportunity to be heard must be "meaningful." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The preferred process is a pre-deprivation hearing. The Court has said "that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). At a minimum, the hearing, whenever it is held, must include the right to present evidence

and to confront adverse witnesses. *Greene v. McElroy*, 360 U.S. 474, 497 (1959).

The Supreme Court of South Carolina recognized that the seizure and destruction of the subject property would violate those principles: "We overrule *State v. Kizer* . . . to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality." App. 22a-23a. The record in this case presents the starkest example of a deprivation of property without an opportunity to be heard. The property owner's counsel, who was present at the seizure, sought to speak to the magistrate and was told, "you don't have a right to say anything. This isn't a hearing and you aren't allowed to say anything. That's just the way it's going to be." Record on Appeal at 251, ¶ 9. (Affidavit of Jill Nubson).

The court below relied upon *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974), in saying that a "post seizure opportunity to be heard fully satisfied the requirements of due process." App. 24a. *Calero-Toledo* is inapposite because it involved a seizure of a yacht used to commit a federal drug offense. Because of "[t]he ease with which an owner could frustrate the Government's interests in the forfeitable property," there was a "'special need for very prompt action' that justified the postponement of notice and hearing until after the seizure." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 52 (1993), *quoting Calero-Toledo*, *quoting Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1972).

But more importantly, for the purpose of this petition, the citation to *Calero-Toledo* begs the constitutional issue of

the *quality* of the hearing; *i.e.*, does the opportunity to be heard, whenever it may occur, provide even the minimally acceptable procedures designed to protect against arbitrary deprivation of property? Although due process concepts are flexible and a post-seizure hearing may be permissible in some circumstances, *see Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997), there is no precedent approving a process which provides no pre- or post- opportunity to present favorable evidence or to contest, in some fashion, the state's evidence.

"Ordinarily, the right to present evidence is basic to a fair hearing. . . . It may be that an individual threatened with some serious sanctions would normally be entitled to present witnesses and documentary evidence. . . ." *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974). That was said in the context of prison disciplinary proceedings, where the operation of the institution "is at best, an extraordinarily difficult undertaking." *Id.* Nevertheless, the Court held that an inmate "should be allowed to call witnesses and present documentary evidence when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.*

And in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that a student facing a suspension of ten days or less must be given "an opportunity to present his side of the story." *Id.* at 581. Quoting Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172-173 (1951), "'No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it,'" 419 U.S. at 580, the Court concluded that "permitting the student to give his version of the events will provide a

meaningful hedge against erroneous action. At least the disciplinarian will be alerted to disputes about facts and arguments . . . [and] may then determine himself to . . . permit cross-examination and allow the student to present his own witnesses." *Id.*, 419 U.S. at 583-584.

No institutional restraint justified totally denying Collins the right to be heard: "You don't have a right to say anything." Record on Appeal, p. 251. If prisons and schools can be required to meet rudimentary due process guarantees, South Carolina must provide more than a magistrate's *ex cathedra* fact-finding, which cannot be contested on appellate review.

The South Carolina Supreme Court's decision to the contrary conflicts with this Court's longstanding commitment to a meaningful opportunity to be heard. The court below acknowledged that due process required the petitioner to have had an opportunity to contest the seizure and destruction of its property. App. 22a. "The question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The South Carolina Supreme Court's answer – appellate review which defers to the meaningless magistrate process – is untenable under the Due Process Clause.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June 7, 2000

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF SOUTH CAROLINA DATED AND FILED FEBRUARY 7, 2000

THE STATE OF SOUTH CAROLINA IN THE SUPREME COURT

The State of South Carolina,

Respondent,

v.

192 Coin-Operated Video Game Machines, Said Machines Bearing Serial Numbers and I.D. Numbers Listed on the Attachment, Being the Property of Collins Entertainment Corporation Located at 1341 Rutherford Road and the Brandon Mill Storage Facility,

Appellants.

South Carolina Law Enforcement Division,

Respondent,

v.

23 Coin-Operated Video Game Machines, Said Machines Bearing Serial Numbers and I.D. Numbers Listed on the Attachment, Being the Property of Collins Entertainment Corporation Located at 1341 Rutherford Road and the Brandon Mill Storage Facility,

Appellants.

Appendix A

Appeal From Greenville County
Thomas J. Ervin, Circuit Court Judge

Opinion No. 25061
Heard October 7, 1999 — Decided February 7, 2000

* * *

BURNETT, A.J.: Respondent South Carolina Law Enforcement Division (SLED) seized 192 and 23 illegal gambling machines from warehouses belonging to Collins Entertainment Corporation. Two magistrates found the machines to be illegal contraband under S.C. Code Ann. § 12-21-2710 (Supp. 1998) and ordered them destroyed. The circuit court affirmed both destruction orders. We affirm.

FACTS

In November 1997, a confidential informant notified SLED that appellant[1] was storing illegal video gambling machines at its Brandon Mills Warehouse and Rutherford Road property in Greenville. In response to this tip, undercover SLED agents posed as potential buyers of a pool table and were admitted to both locations. While there, they personally observed the allegedly illegal machines.

Having corroborated the informant's tip, SLED obtained search warrants from Magistrate Diane Cagle, which were executed on December 22 and 23, 1997, and seized 192

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1. Although the machines are the actual parties, for the sake of clarity we use the term "appellant" to refer to Collins Entertainment Corporation, the owner of the machines.

"Cherry Master" and "8-Liner" video machines. Magistrate Cagle came to the Brandon Mills Warehouse and examined the machines pursuant to S.C. Code Ann. § 12-21-2712 (Supp. 1998). On December 31, 1997, Magistrate Cagle determined the machines violated S.C. Code Ann. § 12-21-2710 (Supp. 1998) and ordered them destroyed.

While on the premises pursuant to the December search warrants, SLED agents discovered an additional 23 machines they believed to be in violation of § 12-21-2710. On January 14, 1998, Magistrate Etta Reid issued an additional search warrant. The machines were seized, and Magistrate Reid examined them, found them to be in violation of § 12-21-2710, and ordered them destroyed.

On appeal to the circuit court, each destruction order was affirmed. The State agreed to stay the destruction of the machines pending this appeal, which consolidates the two destruction orders.

ISSUES

I. Was possession of the machines unlawful?

   A. Does federal law pre-empt state law?

   B. Must the machines be operational to violate the law?

      1. Should *Squires v. SLED* be overruled?

      2. Are the machines contraband *per se*?

3. Did the legislature intend to protect mere storage of the machines?

4. Did reliance on the solicitor's advice make possession lawful?

II. Were the search and seizure of the machines lawful?

A. Were the warrants supported by probable cause?

B. Was SLED's corroboration a warrantless search?

C. What is the remedy if the Fourth Amendment was violated?

III. Were appellant's due process rights violated by the issuance of destruction orders without a hearing?

A. Is the summary destruction authorized by the statute constitutional?

B. If due process requires a hearing in this case, did appellant receive one?

IV. Are the magistrates' orders valid?

V. Did the seizure violate appellant's equal protection rights?

VI. Did appellant establish selective prosecution?

Appendix A

STANDARD OF REVIEW

This Court cannot question findings of fact in a magistrate's court approved by a circuit judge on appeal when there is any evidence, however slight, tending to prove issues involved. *Ward v. Atlantic Coast Line R. Co.*, 155 S.C. 54, 151 S.E. 904 (1930); *see also Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings."). An action for forfeiture of property is a civil action at law. *State v. Petty*, 270 S.C. 206, 241 S.E.2d 561 (1978).

DISCUSSION

I. Was possession of the machines unlawful?

The seized "Cherry Master" and "8-Liner" machines are illegal gambling devices under § 12-21-2710. The statute provides:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which

> deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, and video games with free play feature which meet the technical requirements provided for in Section 12-21-2782 and Section 12-21-2783, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

South Carolina Code Ann. § 12-21-2710 (Supp. 1998). This Court's recent decisions in *State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996) ("Cherry Master" is an illegal slot machine) and *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995) ("Lucky 8 Line" is an illegal slot machine) make clear the machines in question are prohibited by the statute. Moreover, appellant admitted in an affidavit that it knew the machines were illegal. Appellant asserts, however, that the statute should not be applied for numerous reasons addressed below.

A. Does federal law pre-empt state law?

Appellant contends possession of the machines was not unlawful because federal legislation preempts state law. We disagree.

Appellant relies on the Gambling Devices Transportation Act, 15 U.S.C. § 1172(a) (1997), which provides:

> It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession: Provided, that this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: Provided, further, that *it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.*

15 U.S.C. § 1172 (1962) (emphasis added). Appellant argues that in enacting this statute, Congress preempted the power of South Carolina to act when the gambling machines "have already been placed into the stream of interstate or foreign commerce with a destination 'into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.' "

This argument is without merit. First, the federal statute does not pre-empt state law. Federal law may pre-empt a

state law as follows: (1) Congress may explicitly define the extent to which it intends to pre-empt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may pre-empt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose. *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining*, 467 U.S. 461, 469 (1984).

None of the above scenarios exist here. There is no indication in the statute, explicit or implicit, of Congress's intent to occupy the field of gambling regulation. On the contrary, the language of the federal statute makes it clear that it is designed to act in concert with state laws prohibiting gambling. *See Smith v. McGrath*, 103 F. Supp. 286 (D.C. Md. 1952) (the main purpose of the act is to aid states in the local enforcement of antigambling laws by prohibiting the interstate transportation of gambling devices). The statute prohibits the transportation of gambling devices into any state unless the state has enacted a law exempting itself from the statute or legalizing the specific gambling machine being transported into the state. Thus, the federal statute anticipates state legislation in this area and seeks to provide additional federal protection for those states which do not legalize gambling machines. To hold the federal law nullifies state antigambling laws would be to construe the statute in a way that utterly defeats its purpose. Moreover, compliance with both the state and federal statutes is not impossible, as the federal statute prohibits interstate transportation of gambling machines, whereas the state statute prohibits their possession or operation within the state. *See generally Casino Ventures*

v. Stewart, 183 F.3d 307, 311 (4th Cir. 1999) ("Congress has explicitly recognized the preeminent state interests in controlling gambling and has sought to extend, not curb, state police power in this field.").

Second, the machines in question were not in the stream of interstate commerce. The machines were warehoused in appellant's facility in various states of disrepair, and by all indications had been in storage since the beginning of 1995, when this Court decided *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995). Appellant's bare assertion that it intended to send the machines to Georgia does not place the machines into the stream of interstate commerce.

Third, even if the machines were in interstate commerce, they did not comply with the provisions of the Gambling Devices Transportation Act necessary to earn exemption from state law. Section 1174 requires all gambling devices and packages containing such devices to be clearly labeled so that the name and address of the shipper and consignee and the nature of the contents are readily ascertainable from the outside of the package. 15 U.S.C. § 1174 (1962). The circuit court correctly ruled these requirements were designed to put others on notice that the machines are "in interstate commerce" and to prevent persons from merely asserting that the machines are "in interstate commerce" to avoid state antigambling laws.

B. Must the machines be operational to violate the law?

1. Should *Squires v. SLED* be overruled?

Appellant asserts that due to the sophisticated nature of modern video machines, a machine cannot be illegal unless it is fully operational. In *Squires v. South Carolina Law Enforcement Division*, 249 S.C. 609, 155 S.E.2d 859 (1967), we held based on the predecessor statute to § 12-21-2710 that gambling devices need not be operational or in complete repair before they are subject to seizure and destruction. Moreover, component parts, subassemblies, and dies and molds used to make such parts are also subject to seizure and destruction. *Id.* at 613. Appellant argues *Squires* is outdated and should be overruled. We disagree.

The substance of appellant's argument is that in the 1960s, when the predecessor statute to § 12-21-2710 was enacted, slot machines were readily identifiable. Today, with the advent of the computer, a video game machine is simply a box containing a computer which can be configured to play a variety of games, from poker to pac-man; therefore, the machine itself should not be considered illegal.

Although slot machines have changed since the 1960s, the substance of the statute has not. The relevant portions of the current version outlaw the same conduct as its predecessor. *See id.* at 611, 153 S.E.2d at 860 ("Section 5-621 of the Code makes it unlawful for any person to keep on his premises any slot machine or other device pertaining to games of chance of whatever name and kind."). The

legislature is presumed to be aware of this Court's interpretation of its statutes: *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1857 (1998) (there is a basic presumption the legislature has knowledge of judicial decisions construing legislation when later statutes are enacted concerning related subjects). If the General Assembly considered *Squires* outdated, it could have changed the statute to outlaw only the operation, not the mere possession, of gambling machines when it last amended the statute in 1997. *See One Coin-Operated Video Game Machine*, 321 S.C. at 181, 467 S.E.2d at 446 ("Because we are adhering to our earlier interpretation of a *statute*, the General Assembly is free to correct any misinterpretation on our part.") (emphasis in original).

The plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines. The statute makes it unlawful "for any person to keep on his premises *or* operate" certain gambling machines. S.C. Code Ann. § 12-21-2710 (Supp. 1998) (emphasis added); *see also State v. Appley*, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a machine is a violation in itself, separate from the crime of operation). The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.

2. Are the machines contraband *per se*?

The State asserts the machines are contraband *per se*, such that their possession, without more, constitutes a violation. Appellant asserts that coin-operated video games are not inherently illegal, so the machines are therefore only

derivative contraband. We conclude the machines are contraband *per se*.

We have never explicitly used the terms "contraband *per se*" or "derivative contraband." However, we recognized the theoretical distinction in *Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049*, 308 S.C. 68, 417 S.E.2d 85 (1992), where we differentiated between controlled substances or other items which are the subject matter of the crime itself and property normally used for lawful purposes.

Other states have found gambling machines to be contraband *per se* under their statutes and have allowed their forfeiture regardless of their use or operability. *See, e.g.*, *People v. Seeburg Slot Machines*, 641 N.E.2d 997 (Ill. App. 1994) (contraband *per se*), *State v. One Hundred Fifty-Eight Gaming Devices*, 499 A.2d 940 (Md. Ct. App. 1985) (contraband *per se*); *see also State v. Madere*, 352 So.2d 666 (La. 1977) (contraband, same result), *Bell v. State*, 205 S.W.2d 714 (Ark. 1947) (contraband, same result), *State v. Four Bell Fruit Gum Slot Machines*, 162 P.2d 539 (Okla. 1945) (contraband, same result).

These illegal gambling machines cannot be considered derivative contraband because they are themselves the subject of the statute's prohibition. In light of the statute's clear proscription of mere possession of the machines, *see supra* part I.B.1, the machines are clearly contraband *per se*.

3. Did the legislature intend to protect mere storage of the machines?

Appellant next argues the legislature has indicated its intent that owners of illegal machines may legally store them. Appellant bases its argument on the proceedings surrounding the 1993 county-by-county referendum on video poker, later invalidated by this Court. *See Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). A second round of referenda was authorized to comport with our *Martin* decision. In the context of these referenda, the General Assembly enacted § 12-21-2809, which provided:

> In a county in which a majority of the qualified electors vote or have voted to terminate cash payoffs for credits earned on coin-operated devices in a referendum authorized by Section 12-21-2808, the department shall not issue any license for coin-operated devices as defined in Section 12-21-2720(A)(3) and a person may not own or possess these machines in the county other than for purposes of storage, maintenance, or transportation.

S.C. Code Ann. § 12-21-2809 (Supp. 1998). Appellant argues this statute demonstrates the legislature's intent to provide a safe harbor for storage of gambling machines declared unlawful. We disagree.

The class protected by the statute consists of owners of machines which become illegal as a result of a particular referendum. The machines at issue in this case did not

become illegal as a result of that referendum, therefore possession of these illegal machines is not protected. Furthermore, as discussed above, § 12-21-2710 clearly makes mere possession of described machines unlawful. If the statute is clear on its face, we will not look beyond it for the legislature's intent. *See Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956) (if legislative intent is clearly apparent on the face of a statute, the court may not embark upon a search for it).

4. Did reliance on the solicitor's advice make possession lawful?

Appellant argues its reliance on expert advice regarding storage of the machines makes its possession of them lawful. We disagree.

After this Court's decisions in *State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996) and *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995), appellant contacted the Solicitor of the Thirteenth Judicial Circuit requesting guidance regarding storage of illegal machines. In a memorandum to counsel for appellant and respondents, Solicitor Joseph Watson stated he informed appellant and others he would allow them "to conditionally possess the machines as follows:

1. The machines would be warehoused, and not stored in any established business.

2. The computer chips would be removed so that even in storage the machines would not be operable.

3. I placed no time limit on such storage, although it was my understanding that these machines would be retooled to become legal video poker machines in the future."

Appellant argues its reliance on the Solicitor's advice makes its possession of the machines lawful.

The reliance defense "is designed to refute the government's proof that the defendant intended to commit the offense." *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981). Its essential elements are: (a) full disclosure of all pertinent facts to an expert, and (b) good faith reliance on the expert's advice. *Id.*

The reliance defense is inapplicable here. Appellant is not being prosecuted under § 12-21-2710, so its intent is not at issue. Even if appellant were subject to criminal charges for possession of the illegal machines, intent is not an element of the statute. The Solicitor's advice does not make possession of these illegal machines lawful.

II. Were the search and seizure of the machines lawful?

Appellant argues the circuit court erred in concluding the machines were seized pursuant to lawful search warrants. Appellant does not challenge the facial sufficiency of the

warrants. Rather, appellant argues the warrants are not based on probable cause because the affidavit supporting the December warrants provides no information concerning the informant's reliability, veracity, or basis of knowledge. Moreover, appellant argues, these deficiencies cannot be cured by police corroboration because the corroboration was itself an illegal, warrantless search.[2] We disagree.

A. Were the warrants supported by probable cause?

The United States Supreme Court has consistently held "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Illinois v. Gates*, 462 U.S. 213, 236 (1983). *Gates* established a "totality of the circumstances" test for determining whether there is probable cause to believe contraband or evidence is located in a particular place. *Id.* at 230. "[S]o long as the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Id.* at 236 (internal quotations omitted).

Appellant correctly asserts that a warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. However, independent verification by law enforcement officers cures

2. Appellant challenges the January warrant on this same ground. Thus, all arguments pertaining to illegal searches apply to this warrant as well.

any defect. *See Gates*, 462 U.S. at 241 ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work."); *see also State v. Viard*, 276 S.C. 147, 150, 276 S.E.2d 531, 532 (1981) (upholding a warrant based on the independent verification by the affiant of an informant's tip).

Here, the magistrate had a substantial basis for concluding a search would uncover illegal gambling machines. The information provided by the confidential informant was independently corroborated by undercover SLED agents. This verification established probable cause under the totality of the circumstances.

As an additional ground for invalidating the seizure, appellant argues the information contained in the affidavit for the December warrants was stale, and therefore could not have been the basis of a finding of probable cause. We disagree.

In order for an affidavit to support probable cause, "it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State v. Winborne*, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (internal quotation omitted). "An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient." *Id.* Here, appellant argues the affidavit does not support a finding of probable cause because (1) it does not state the date the confidential informant saw the machines, only that he informed SLED agents sometime around November 1997, and (2) it does not

state the date SLED agents corroborated the machines' presence.

The date on which the informant saw the illegal machines is irrelevant because SLED's corroboration was the basis of the magistrate's probable cause finding, not the informant's tip. Furthermore, the lack of a date the SLED agents corroborated the tip does not defeat probable cause in this case. The affidavit does not fail "altogether to state the time of the occurrence," as in *Winborne*. It merely fails to state when in the two-month period between November 1 and December 22, 1997, the agents corroborated the tip. The longest possible period between the corroboration and the issuance of the warrant is 52 days.

We have never addressed what length of time is acceptable between the establishment of probable cause and the execution of a warrant. However, the Court of Appeals has held that a 60-day lapse did not create a staleness problem where the items sought were not such that one would expect to be removed or consumed in the interim:

> While the lapse of time involved is an important consideration and may in some cases be controlling, it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought.

State v. Corns, 310 S.C. 546, 550-51, 426 S.E.2d 324, 326 (Ct. App. 1992) (quoting *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975)). There was very little risk the property at

issue here would be removed between the time the undercover agents visited the warehouses, which was at the very earliest sometime in November, and the time the agents obtained and executed the warrants on December 22 and 23. While it may have been preferable for the affiant to include the date of the undercover investigation in the affidavit, the United States Supreme Court has warned against the danger of "hypertechnical, rather than . . . commonsense" interpretation of affidavits when reviewing for probable cause. *Gates*, 462 U.S. at 236 (internal citation omitted). The substantial basis for the magistrate's finding of probable cause was not defeated by the affiant's failure to state the precise date of the investigation.

B. Was SLED's corroboration a warrantless search?

Appellant asserts the circuit court's analysis was faulty because the verification of the informant's tip by undercover agents was itself an illegal, warrantless search. Moreover, appellant asserts the additional 23 machines were not in plain view and must also have been discovered by a warrantless search while SLED agents were supposed to be guarding and inventorying the machines already seized.

The United States Supreme Court has defined the boundaries of an undercover investigation without a warrant. In *Lewis v. United States*, 385 U.S. 206 (1966), relied upon by respondents, an undercover officer was invited into the petitioner's home on two occasions to purchase marijuana. The Court found the search did not violate the Fourth Amendment: "During neither of his visits to petitioner's

home did the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business." *Id.* at 210. In *Gouled v. United States*, 255 U.S. 298 (1921), *overruled on other grounds*, 387 U.S. 294 (1967), relied upon by appellant, a business acquaintance of the petitioner, acting under orders of federal officers, entered the petitioner's office on pretenses of making a social visit. In the petitioner's absence, he ransacked the office and seized private, incriminating papers. The Court found the search violated the Fourth Amendment.

The record does not reveal the SLED officers' actions within appellant's warehouse. Without more, it cannot be determined whether the officers conducted a warrantless search. *See Germain v. Nichol*, 278 S.C. 508, 299 S.E.2d 335 (1983) (appellant has burden of providing the Court with a sufficient record upon which Court can make a decision). Furthermore, there is "a presumption of validity with respect to the affidavit supporting the search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Unless appellant tenders facts showing the officers conducted a warrantless search, there is no basis on which this Court can look behind a facially valid warrant.

As to the January warrant, the supporting affidavit states the additional 23 machines were seen in plain view while the officers were executing the December warrant. Although the December warrant had expired by the date the January warrant was issued, that does not imply it had expired at the time the officers viewed the additional 23 machines. Accepting the veracity of the affidavit, as the magistrate was entitled to do, probable cause existed for the issuance of the January warrant.

Appendix A

C. What is the remedy if the Fourth Amendment was violated?

Finally, even if the searches were illegal — and we conclude they were not — appellant has no remedy. The usual remedy for an unlawful search is suppression of the evidence in a criminal trial against the possessor. *See Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to the states). Here, no criminal charges have been filed against appellant.

The exclusionary rule applies in civil forfeiture actions to suppress evidence seized in violation of the Fourth Amendment where the property sought to be forfeited is derivative contraband.[3] *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965). Here, however, there was no jury from which to suppress the evidence. Furthermore, because the machines are contraband *per se*, the State certainly cannot return them to appellant, which is presumably the remedy sought. *See Trupiano v. United States*, 334 U.S. 699 (1948), *overruled on other grounds*, 339 U.S. 56 (1967) ("[S]ince this property was contraband, they have no right to have it returned to them."); *see also State v. Four Bell Fruit Gum Slot Machines*, 162 P.2d 539 (Okla. 1945) (slot machines seized without a warrant were contraband and must be destroyed regardless of legality of seizure).

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3. *See* discussion of derivative contraband versus contraband *per se supra* at I.B.

III. Were appellant's due process rights violated by the issuance of destruction orders without a hearing?

Appellant argues that its rights to due process of law under the Fourteenth Amendment of the United States Constitution and Article I, section 3 of the South Carolina Constitution were violated because it was deprived of its property without a hearing. We disagree.

Appellant's machines were seized pursuant to § 12-21-2712 of the South Carolina Code which mandates:

> Any vending or slot machine, punch board, or other device pertaining to games of chance prohibited by § 12-21-2710 must be seized by any officer of the law and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if he is satisfied that it is in violation of § 12-21-2710 or any other law of this State he shall direct that it be immediately destroyed.

S.C. Code Ann. § 12-21-2712 (Supp. 1998). A possible constitutional construction of a statute must prevail over an unconstitutional interpretation. *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331 (1977). We conclude the magistrate's examination of the seized machines under § 12-21-2712 must include an opportunity for the owner of the machines to be heard concerning their legality. We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal

property without any opportunity for the owner to contest the magistrate's determination of illegality.

We find no due process violation in this case, however, because appellant has had the opportunity to be fully heard by both the circuit court and this Court. Moreover, appellant conceded the illegality of the machines in an affidavit, so it could not thereafter contest the magistrate's determination of illegality.

Appellant argues its due process rights were violated because it did not receive a pre-*seizure* hearing. We disagree. The statute does not direct a pre-seizure hearing, nor is one required in a civil forfeiture case. The most due process requires is a post-seizure opportunity for an innocent owner "to come forward and show, if he can, why the *res* should not be forfeited and disposed of as provided for by law." *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981).

In *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 209 (1991), a case involving the forfeiture of real property used in the sale of illegal drugs, this Court held that a post-seizure hearing satisfies the requirements of due process in a civil forfeiture case. We quoted with approval *Allen v. Tucker*, 715 F. Supp. 266, 268 (E.D. Mo. 1989), where it was held:

> A claimant's contention that his procedural due process rights have been violated without a hearing prior to the taking of his property is untenable when the claimant is afforded the full

> weight of judicial process in proceedings, such as these presently before the Court, to determine if the claimant's property was properly forfeited.

Id. at 236. *See also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (recognizing that seizure for the purpose of forfeiture "presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure [does] not deny due process"). Appellant's post-seizure opportunity to be heard fully satisfied the requirements of due process.

IV. Are the magistrates' orders valid?

Appellant argues the magistrates' orders and returns (which incorporate the orders) are factually insufficient and therefore invalid. We disagree.

In an action tried upon the facts without a jury, "the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. If a party appeals the magistrate's order, the magistrate is required to "make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court." S.C. Code Ann. § 18-7-60 (1976). The magistrates in this case filed identical returns, incorporating their identical orders, which state:

> This matter comes before the Court pursuant to S.C. Code Ann. 12-21-2712 (Supp. 1996) at the request of the South Carolina Law Enforcement Division, whose Agents seized the

> defendant's [sic] machines. These machines are now before the Court in order to determine if they are slot machines prohibited by the S.C. Code Ann. 12-21-2710 (Supp. 1996).
>
> After carefully reviewing these machines, I find them to be slot machines. These machines register varying amounts of winnings depending upon which combination of various symbols are displayed after a coin is inserted and a button is pushed. They require no skill to play. I have considered the Court's reasoning in *State v. Four Video Slot Machines*, __ S.C. __, 453 S.E.2d 896 (1995) and *State v. One Coin-Operated Video Game Machine*, __ S.C. __, 467 S.E.2d 443 (1996), as well as the 1993 amendments to Title 12 of the South Carolina Code concerning video games. I find and conclude that the defendant machines are in violation of S.C. Code Ann. 12-21-2710 (Supp. 1996), and do hereby order their destruction. The defendant machines will be destroyed thirty (30) days after the date of this order.

Appellant argues these returns are invalid because they make "purely conclusory" statements that the machines violate the statute. Appellant cites *State v. Harper*, 297 S.C. 257, 376 S.E.2d 272 (1989) for the proposition that a factually inadequate magistrate's order should be reversed. *Harper* is distinguishable. *Harper* involved an attorney's contempt conviction which was reversed because the magistrate made no findings that the attorney behaved

contemptuously. Here, the magistrates clearly set out what statute was violated and how the machines violated it.

Appellant further complains the returns provide no detail concerning the extent of the examination, and that as far as appellant knows, the first magistrate only "examined" four of the nearly two hundred machines she found illegal. This argument is unpersuasive for two reasons. First, appellant admits elsewhere in its brief that only approximately five of the machines were operational. In fact, appellant relies on this fact to support its argument that the inoperable machines should not be considered illegal. The magistrate could not therefore have tested the other machines. However, testing was not required in order to find them unlawful. The inventory attached to the search warrant return provided information from which the magistrate could conclude the seized machines were illegal under *State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996), *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995), and *Squires v. South Carolina Law Enforcement Division*, 249 S.C. 609, 155 S.E.2d 859 (1967). The magistrates were entitled to rely on the existing statutes and case law in finding the machines unlawful and ordering their destruction.

Second, and more compellingly, appellant admits in an affidavit that the machines in question had been declared illegal to operate. The legality of these machines under state law is not at issue in this case except insofar as appellant asks this Court to overrule *Squires* (see part I.B.1). Even if the magistrates' returns should have been more detailed — and we do not see in what respect they should have — that

does not invalidate the destruction orders when the machines clearly violate state law.

V. Did the seizure violate appellant's equal protection rights?

Appellant argues the state constitutional and statutory provisions prohibiting state lotteries and the selective enforcement thereof violate the mandates of equal protection. Appellant puts forward two arguments: traditional equal protection and selective prosecution. Appellant's selective prosecution argument is discussed below. Appellant's traditional equal protection argument is not preserved for review, as the lower court did not address it and appellant did not raise it in its motion to reconsider. *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994) (issue not properly preserved cannot be raised for first time on appeal).

VI. Did appellant establish selective prosecution?

Appellant argues it has been selectively prosecuted by law enforcement and is entitled to discovery to prove this claim. We disagree.

Courts look suspiciously on selective prosecution claims because they "ask[ ] the court to exercise judicial power over a 'special province' of the Executive." *United States v. Armstrong*, 517 U.S. 456 (1996) (citations omitted). Because of this balance of powers concern, a "presumption of regularity" supports prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.*

at 464 (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1 (1926)).

To establish selective prosecution, a defendant must satisfy a two-prong test. First, a defendant must show "he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted." *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978). Second, "the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech." *Id.* at 865. *See also Armstrong*, 517 U.S. at 465 ("The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.' The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' ") (citations omitted). Appellant claims it has been singled out by prosecutors in retaliation for its owner's public statements criticizing the Attorney General.

The circuit court was correct in finding appellant did not present evidence to support a claim of selective prosecution. In the first place appellant is not being criminally prosecuted. It is merely being required to forfeit the illegal contraband in its possession.

Moreover, even if this action can be interpreted to be analogous to a criminal prosecution, such that the same constitutional rights attach, appellant has not met the first prong of the selective prosecution test. That is, appellant

has not alleged there are others engaging in similar conduct who have not been prosecuted. Appellant asserts only that certain members of the media are violating a state law forbidding the advertising of gambling. Appellant does not claim these media outlets are keeping illegal gambling machines on their premises in violation of § 12-21-2710.[4]

Appellant further argues that the only reason it has been unable to prove the second prong of his selective prosecution claim, impermissible motive, is that it was denied discovery. The judge properly denied appellant's request for discovery when appellant was unable to make out even the barest showing on the first prong of the test. In *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978), cited by appellant, the Eighth Circuit Court of Appeals held the district court properly denied discovery on a selective prosecution claim when the defendant was unable to produce "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *Id.* at 865. *United States v. Armstrong*, 517 U.S. 456 (1996), gives an example of insufficient evidence:

> In the case before us, respondents' "study" did not constitute "some evidence tending to show

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4. Appellant also argues the Catawba Indians are not being prosecuted, but it does not allege the Catawbas have violated any laws. Rather, appellant argues the laws of South Carolina impermissibly allow the Catawbas to operate bingo. Thus, this argument is not relevant to appellant's selective prosecution claim. It may be relevant to appellant's claim of denial of equal protection, but, as discussed above, that argument is not preserved for review.

> the existence of the essential elements of" a selective-prosecution claim. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence.

(internal citations omitted). The evidence offered by appellant here is, if anything, less persuasive than that proffered in *Armstrong*. Appellant includes in the record numerous newspaper articles regarding this case and its owner's statements criticizing the Attorney General, as well as newspaper advertisements for Harrah's casino. None of this evidence demonstrates the proof required of appellant to make out even the first prong of a selective prosecution claim, that is, that others who could have been prosecuted for the same offenses were not. *See Armstrong*, 517 U.S. at 465. "[A] mere allegation of selective prosecution by the defendant does not require the government to disclose the contents of its files." *Catlett*, 584 F.2d at 865.

Appendix A

CONCLUSION

We **AFFIRM** the circuit court on all grounds. The State shall proceed with the destruction of the 192 and 23 illegal machines.

FINNEY, C.J., MOORE, J., Acting Associate Justices Thomas E. Huff and William T. Howell, concur.

APPENDIX B — ORDER OF THE COURT OF COMMON PLEAS OF SOUTH CAROLINA FOR THE THIRTEENTH JUDICIAL CIRCUIT, GREENVILLE COUNTY DISMISSING APPEAL AND AFFIRMING MAGISTRATE'S ORDER OF DESTRUCTION IN *SC LAW ENFORCEMENT DIVISION v. 23 COIN OPERATED VIDEO GAME MACHINES, etc., et al.* DATED JUNE 9, 1998 AND FILED JUNE 23, 1998

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

CASE NO: 98-CP-286

SC LAW ENFORCEMENT DIVISION,

PLAINTIFF,

VS.

23 COIN OPERATED VIDEO GAME MACHINES, SAID MACHINES BEARING SERIAL NUMBERS AND ID NUMBERS LISTED ON THE ATTACHMENT, BEING THE PROPERTY OF COLLINS ENTERTAINMENT CORPORATION LOCATED AT 1341 RUTHERFORD ROAD AND THE BRANDON MILL STORAGE FACILITY,

DEFENDANTS

ORDER DISMISSING APPEAL AND AFFIRMING MAGISTRATE'S ORDER OF DESTRUCTION

* * *

Appendix B

Hearing Date: May 4, 1998

* * *

FACTUAL BACKGROUND

This matter comes before me on an Appeal from the Magistrate's Court Order of Destruction dated January 15, 1998 of Magistrate Etta Reid.

On January 14, 1998, agents with the South Carolina Law Enforcement Division (SLED) seized 23 coin operated video game machines pursuant to a search warrant issued the same date. These machines were owned and were found on the premises owned by Fred Collins, d/b/a Collins Entertainment Corporation. The machines were then taken before Magistrate Reid of Greenville County who, after examining the machines, declared them to be in violation of §12-21-2710 of the South Carolina Code of Laws, as amended.

On January 26, 1998, an Appeal from the Order of Destruction was filed. Subsequently, Magistrate Reid filed her return to the Appeal as required by statute. Pursuant to §18-7-10 et. seq., this Appeal is now before the Circuit Court.

Previously, in February of 1998, this court heard arguments of these parties in a very similar situation. The February hearing involved 192 coin operated video game machines of which were owned by and found on premises owned by Fred Collins, d/b/a Collins Entertainment Corporation. The 192 coin operated video game machines

were seized pursuant to search warrants obtained by SLED. On March 4, 1998 this court issued an Order affirming the Magistrate's Order of Destruction of the 192 Coin Operated Machines.

Prior to the commencement of the hearing on May 4, 1998, counsel agreed and stated to the Court that the issues involving the 23 coin operated video game machines would be substantially the same issues as those previously argued in regards to the 192 coin operated video game machines. Furthermore, counsel agreed and stated to the court that the arguments that they would present at this hearing would be substantially the same arguments presented at the February hearing, other than to dispute the lawfulness of the search warrant obtained in this matter upon the additional grounds that have been advanced by counsel in the memorandum submitted to the Court. The Court is unpersuaded as to Appellant's arguments and the parties have further agreed that the warrant and the consent order entered into between the parties and signed by Honorable C. Victor Pyle, Jr. will also be included as a part of the record herein. Therefore, this Court finds there is no need to hear additional arguments on this matter. Therefore, based upon the materials presented to the court on the 23 coin operated machines, as well as the materials and arguments made in relation to the 192 coin operated machines, the court affirms the Magistrate's Order of Destruction, and hereby incorporates the Order of March 4, 1998 setting forth specific findings of facts and conclusions of law.

THEREFORE, IT IS ORDERED, that the Magistrate's Order of Destruction dated January 15, 1998 is affirmed and

the Appeal is dismissed with prejudice. The State has agreed to stay the destruction of these illegal machines until the Appellant has exhausted all Appeals.

s/ Tom J. Ervin, Judge
Judge Tom J. Ervin
Presiding Judge
Thirteenth Judicial Circuit

DATED: June 9, 1998
Greenville, South Carolina

APPENDIX C — ORDER OF THE COURT OF COMMON PLEAS OF SOUTH CAROLINA FOR THE THIRTEENTH JUDICIAL CIRCUIT, GREENVILLE COUNTY DISMISSING APPEAL AND AFFIRMING MAGISTRATE'S ORDER OF DESTRUCTION IN *THE STATE OF SOUTH CAROLINA v. 192 COIN-OPERATED VIDEO GAME MACHINES, etc., et al.* DATED AND FILED MARCH 4, 1998

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

98-CP-23-22

THE STATE OF SOUTH CAROLINA,

PLAINTIFF/RESPONDENT

VS.

192 COIN-OPERATED VIDEO GAME MACHINES, SAID MACHINES BEARING SERIAL NUMBERS AND ID NUMBERS LISTED ON THE ATTACHMENT, BEING THE PROPERTY OF COLLINS ENTERTAINMENT CORPORATION LOCATED AT 1341 RUTHERFORD RD. AND THE BRANDON MILL STORAGE FACILITY,

DEFENDANT/APPELLANT

ORDER DISMISSING APPEAL AND AFFIRMING MAGISTRATE'S ORDER OF DESTRUCTION

* * *

Appendix C

Date of Hearing: February 10, 1998

* * *

This matter comes before me on an appeal from the Magistrate's Court Order of Destruction dated December 31, 1997 of Magistrate Diane Cagle.

On December 23, 1997, agents, with the South Carolina Law Enforcement Division (SLED) seized 192 coin operated video game machines pursuant to search warrants issued the same date. These machines were owned and were found on the premises owned by Fred Collins, d/b/a Collins Entertainment Corporation ("Collins"). The machines were taken before Magistrate Diane Cagle of Greenville County who, after examining the machines, declared them to be in violation of Section 12-21-2710 of the South Carolina Code of Laws, as amended.

On January 5, 1998, an appeal of the Order of Destruction was filed. On January 30, 1998, Magistrate Cagle filed her return to the appeal as required by statute. Pursuant to Section 18-7-10 et. seq., this Appeal is now before the Circuit Court. After reviewing the materials presented by both parties and after hearing arguments of counsel, the Court affirms the Magistrate's Order of Destruction for the reasons that follow.

FACTUAL BACKGROUND

On December 23, 1997, Special Agent Asbill of SLED appeared before Magistrate Diane Cagle and obtained a

search warrant for premises located at 1341 Rutherford Road, Greenville, South Carolina and for premises located at the Brandon Mills Storage Facility, Greenville, South Carolina. The affidavits for the search warrants set forth with specificity the premises to be searched and the property sought and the fact that the agent had received information from a confidential source that illegal machines were on the premises to be searched. Also included in the affidavit was the fact that pursuant to that information, agents with SLED entered the premises in an undercover capacity and found that illegal machines were on the premises.

Upon the issuance of the search warrants, agents of SLED executed the search warrants at the premises and seized the 192 coin-operated video machines as outlined in the Magistrate's Order of Destruction. The Magistrate then examined the machines and found that they were in violation of Section 12-21-2710. Magistrate Cagle found that the machines registered varying amounts of winnings depending upon which combination of various symbols are displayed after a coin is deposited and a button is pushed. She further found that these machines required no skill to play and ordered their destruction pursuant to Section 12-21-2710 of the South Carolina Code of Laws, as amended. Her ruling was made after consideration of *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E. 2nd 896 (1995) and *State v. One Coin Operated Video Machine*, 321 S.C. 176, 467 S.E. 2nd 443 (1996).

CONCLUSIONS OF LAW

Appellant's first exception on appeal states that the devices, cabinets or components examined by the magistrate

are not illegal slot machines or gambling devices. This Court finds this argument is without merit. Section 12-21-2710 specifically states:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, punch board, pull board or other device pertaining to games of chance of whatever name or kind, including those machines, boards or other devices that display difference pictures, words or symbols, at different play or different numbers whether in words or figures, or which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine.

The statute further sets forth certain machines or games that are exempted from the statute. Our Court has held in *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E. 2nd 896 (1995) that "Lucky 8 Line" machines are not exempt under Section 12-21-2710. In that case, the "Lucky 8 Line" machine was described by the Court as

> "a coin operated machine with a video display designed to simulate a slot machine. The player inserts money and presses a button. A computer program causes the screen to roll and randomly stop, displaying words and symbols. Certain combination of symbols earn the player an additional turn. The player has no control over the combination of words or symbols appearing on the video screen."

Appendix C

The Court's description is essentially the same as that given by Magistrate Cagle in her Order of Destruction of December 31, 1997.

The Supreme Court of South Carolina addressed the issue of illegal gambling devices in *State v. One Coin Operated Video Machine*, 321 S.C. 176, 467 S.E.2nd 443 (1996) and held that the "Cherry Master" was not one of the devices exempted under Section 12-21-2710. The court found that its operation was similar to the "Lucky 8 Line" machines previously declared illegal. The "Cherry Master" was also declared illegal to possess pursuant to Section 12-21-2710. In the case at hand, the machines described by Magistrate Cagle are "extremely similar" to the "Cherry Master" and "Lucky 8 Line" machines. The machines seized bear the name "Cherry Master" and their description matches machines previously held by our Court to constitute illegal slot machines. Therefore, this Court concludes that the machines seized were illegal slot machines and are subject to destruction pursuant to Section 12-21-2710.

Additionally, the appellant argues that the machines were found in varying states of repair and that none of the machines were being operated or kept for the purpose of operation in this state. It is appellant's assertion that only those machines in operation are illegal. This argument is without merit. The statute specifies that it is unlawful for anyone to "keep on his premises OR operate . . ." a slot machine. Section 12-21-2710 SC Code of Laws, as amended (emphasis added). The disjunctive "or" is clear that the legislature intended, and did in fact, make the possession of the machines illegal, regardless of their intended use or state

of operation. In *Squires v. SLED*, 249 S.C. 609, 153 S.E. 2nd 859 (1967), the Court specifically held that the statute providing for seizure by law enforcement officers of any slot machine does not require that the gambling device be operative or in complete repair before being subject to seizure. Furthermore, the *Squires* Court held that the machine parts, subassemblies and the dies and molds used to make such parts are also subject to seizure and destruction. See also *State v. Appley*, 207 S.C. 284, 35 S.E. 2nd 835 (1945) (which held that possessing the machine is a separate violation from the crime of operation.)

The appellant next asserts that there was no opportunity to provide adequate information to the magistrate to clarify the function and operation of the devices and therefore the seizure was in violation of due process. Since the case law holds that the function or operation of the device is immaterial to the unlawful possession of the machines or its components, this argument of appellant must also fail. The statute outlining the procedure to be followed by law enforcement upon seizure of these machines is set forth in Section 12-21-2712. The law provides that the enforcement officer shall immediately take the machine before a magistrate for examination to determine if the machine violates Section 12-21-2710.

This due process argument was addressed by our Supreme Court in *State ex rel Attorney General v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932). The Court held that the statute authorizing summary destruction of slot machines, if found by the magistrate to be gambling devices, was not unconstitutional. In *Kizer*, the Court stated:

> there is no doubt that the procedure outlined in section 3 is very drastic and summary. It provides that the machine may be taken before a magistrate, who shall examine the same, and if he comes to the conclusion that the machine is a gambling device, then he may order it to be summarily destroyed. There is no provision for a hearing by the magistrate. There is no provision for the defendant to test the accuracy or wisdom of the magistrate's decision. It is certainly a drastic remedy. But, when we take into consideration the evil which the statute seeks to remedy, we do not think that it violates the due process clause of the Fourteenth Amendment. (*Kizer*, at 449)

Appellant next asserts that there was no factual basis for the findings of the Magistrate. Upon reviewing the Magistrate's Order of Destruction, it is evident that the Magistrate set forth sufficient findings of facts and conclusions of law, citing the statutes and the case law relied upon to make her decision. She described the machines with such specificity as to be extremely similar to the language used in *State v. Four Coin Operated Video Machines*, supra. Therefore, this argument of appellant is also without merit.

The appellant's next assertion is that the machines were seized as a result of an unlawful search in violation of the 4th Amendment of the United States Constitution and Article 1 Section 10 of the South Carolina Constitution which protect the people from unreasonable searches and seizures and sets forth the requirement of probable cause before the issuance of any warrant. This Court has reviewed the contents of the

search warrants obtained by the SLED agents and issued by Magistrate Cagle regarding these machines, and finds them to be valid search warrants based upon probable cause. The affidavits specifically state that upon receiving information from a confidential informant, SLED agents entered the premises in an undercover capacity and verified the existence of the machines on the premises, as had been related to him. There is no evidence before this Court that the agents entered the premises in an unlawful manner when they entered in their undercover capacity. This information, verified by the SLED agents, was then supplied to the Magistrate for the purpose of securing a search warrant. The information supplied to the Magistrate is clearly sufficient for a Magistrate to determine probable cause. This Court specifically finds that probable cause was established to the magistrate under "the totality of the circumstances" and the search warrants were properly issued and executed. Therefore, the machines were seized pursuant to lawful search warrants.

The appellant also argues that the seizure of the machines violates due process because it interferes with his right to contract. Appellant asserts that certain machines were being modified or otherwise prepared for shipment to another state. The Court relies upon *State v. Appley*, supra, which held that the fact that the machine was transported in interstate commerce is no defense in a prosecution of the possessor for violation of the law making it unlawful to keep or operate vending or slot machines. The possessor's intention regarding a given machine is irrelevant. A conscious or intentional violation of the law is unnecessary for conviction of violation of the statute making it unlawful to operate or keep any vending or slot machine. *State v. Appley* at 837.

Appendix C

The appellant provided an affidavit of Fred Collins, President of Collins Entertainment Corp. which states that after the decisions of *State v. Four Video Slot Machines*, supra and *State v. One Coin Operated Video Machine*, supra, he contacted then Solicitor, Joseph Watson asking for clarification regarding storage of these machines. In his affidavit, he admits that the machines in question had been declared illegal to operate under those cases. Therefore it is undisputed that Collins knew of the illegality of these machines while there were in Collins' possession. Thus, there is no issue as to a knowing and intentional possession by Collins after the machines had been declared illegal.

The appellant next asserts that the South Carolina statute prohibiting the possession of gambling machines is superceded by federal statute Title 15 U.S.C. Section 1172. Upon reviewing the federal statute, this Court finds that the appellant's argument must fail. A state law is preempted by federal law in any one of the following three situations: First, Congress may explicitly delineate in the federal legislation to what extent state law is preempted. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1993). Secondly, Congress may provide in legislation that they are specifically reserving an entire field of regulation for federal providence, in which event the States may not enact regulations. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982). Finally, federal law is considered to preempt state law whenever state laws are specifically inconsistent or when compliance with both state law and federal law is impossible. *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). Title 15 U.S.C. Section 1172 does not expressly define any scope of preemption, contains no

language indicating that Congress is reserving the entire field of regulation of gambling devices, and compliance with both the federal statute and the South Carolina statute is not impossible. Therefore, this court concludes that there is no federal preemption.

Title 15 U.S.C. Section 1172 specifically prohibits transporting any gambling device into any place in State from any place outside of the State. Thus, the Federal statute cited seeks to act in concert with State statutes by federally prohibiting the transportation of gambling devices in *interstate commerce*, while States may prohibit the transportation or possession of gambling devices *intrastate*. Therefore, by its very nature and design, Title 15 U.S.C. Section 1172 inherently recognizes that States are free to enact their own legislation regulating gambling devices. Further, Title 15 U.S.C. Section 1172 specifically provides that States may enact their own laws exempting such State from the provisions of this statute, thereby permitting interstate transportation of gambling devices within their borders. Title 15 U.S.C. Section 1172 further provides an exemption for the transportation of gambling devices *into* a state where the gambling device is specifically enumerated as lawful. Accordingly, this Court concludes that Title 15 U.S.C. Section 1172 does not pre-empt state law. Rather, this Title clearly recognizes that states may legislate in this area.

The final example where preemption may arise, that compliance with both federal and state law is impossible, has not been demonstrated by the Appellant. Here, the federal and state legislation in question are specifically designed to

act in concert with one another, with federal law regulating interstate activity while state laws regulate intrastate activity. Compliance with both state and federal law is certainly possible in this instance.

The Appellant also contends that the machines are within the scope of "interstate commerce" traveling to a state, Georgia, in which the gambling devices are lawful, thereby falling within the exemption provided by Congress in Title 15 U.S.C. Section 1172 in order to facilitate interstate commerce. The 15 U.S.C. Section 1172 specifically provides:

> "That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in statute of that State."

In order to fall within the exemption, Title 15 U.S.C. Section 1173 requires that the manufacturer and dealer must be registered with the United States Attorney General. Title 15 U.S.C. Section 1174 further requires that the gambling devices, when being shipped or transported interstate, should be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package.

These procedural requirements of the necessary labeling and paperwork serve to provide a necessary exemption for those machines and owners who must transport their

machines, interstate in order to deliver them to States in which the operation and possession are lawful. However, these procedural requirements set forth specific qualifying factors (i.e., registration and detailed labeling and shipping requirements) in order to put others on notice that the machines, when in "interstate commerce" are specifically protected and are exempted from federal or state seizure and forfeiture. These procedural guidelines prevent persons from merely asserting that the machines are in "interstate commerce". These requirements distinguish those machines which are exempt and protected from those machines which are owned by unregistered manufacturers and dealers.

The Appellants' mere blanket assertion that these devices were in the stream of interstate commerce because they were located in a warehouse owned or operated by a business which also conducts business in Georgia is insufficient to invoke this Federal exemption. At the time these machines were seized, they were all found warehoused in a building. No machines were seized on a truck loading dock or at any other commercial transport facility. No machines were clearly marked and labeled for transport to a specific addressee within another state where such device was legal. Without such identification, labeling and transportation documents, the court concludes that the Appellant's mere assertion that these machines were in "the stream of interstate commerce" fails to establish the procedural requirements necessary to invoke the federal exemption.

In conclusion, the Court holds that Title 15 U.S.C. Section 1172 does not supercede the South Carolina statute. This Court holds that the Appellant has failed to demonstrate

the factual basis which is statutorily required to invoke the exemption delineated in Title 15 U.S.C. Section 1172.

The appellant also contended that it had been the victim of a selective prosecution by the State of South Carolina. There is no evidence in the record to support such a claim. Appellant argued that the *Greenville News* and the *Spartanburg Herald* have not been prosecuted despite the fact that they may have certain commercial advertisements for gambling located outside of this state. Further, appellant argues that the Catawba Indians are not being prosecuted for engaging in gambling activities in York and Chester Counties. This Court has reviewed the law concerning selective prosecution, including the recent case of *United States v. Armstrong*, 116 S.Ct. 1480 (1996) and finds that there is no factual basis for appellant's claim of selective prosecution. In *Armstrong*, the Court held that "a selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." Id at 1486.

The claim that the Attorney General and the Solicitor have engaged in selective prosecution is not supported by the evidentiary record before this Court.

HOLDING

The Magistrate's Order of Destruction of December 31, 1997 is AFFIRMED and the Appellant's Appeal is DISMISSED WITH PREJUDICE.

Appendix C

The State of South Carolina has agreed to stay the destruction of these illegal machines until the Appellant has exhausted all appeals.

s/ Tom J. Ervin
Judge Tom J. Ervin
Presiding Judge
Thirteenth Judicial Circuit

March 4, 1998
Greenville, South Carolina

APPENDIX D — ORDER OF DESTRUCTION OF THE MAGISTRATE'S COURT OF SOUTH CAROLINA, GREENVILLE COUNTY IN *SC LAW ENFORCEMENT DIVISION v. 23-COIN OPERATED VIDEO GAME MACHINES, etc., et al.* DATED JANUARY 21, 1997

IN THE MAGISTRATE'S COURT
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

SC Law Enforcement Division

Plaintiff

Vs.

23-Coin operated Video Game machines, Said Machines bearing serial numbers and ID numbers listed on the attachment, being the property of Collins Entertainment Corporation located at Brandon Mill Storage Facility

Defendants

ORDER OF DESTRUCTION

This matter comes before the Court pursuant to SC Code Ann. 12-21-2712 (Supp 1996) at the request of the South Carolina Law Enforcement Division, whose Agents seized the defendant's machines. These machines are now before the Court in order to determine if they are slot machines prohibited by the SC Code Ann. 12-21-2710 (Supp. 1996).

After carefully examining these machines, I find them to be slot machines. These machines register varying amounts

of winnings depending upon which combination of various symbols are displayed after a coin is inserted and a button is pushed. They require no skill to play. I have considered the Court's reasoning in State v. Four Video Slot Machines, __ SC __, 453 S.E. 2d 896 (1995), and State v. One Coin Operated Video Game Machine, __ SC __, 467 S.E. 2d 443 (1996), as well as the 1993 amendments to Title 12 of the South Carolina Code concerning video games. I find and conclude that the defendant's machines are in violation of SC Code Ann. 12-21-2710 (Supp. 1996), and do hereby order their destruction. The defendant's machines will be destroyed thirty (30) days after the date of this order.

AND IT IS SO ORDERED.

s/ Etta James Reid
Magistrate

This 21 day of January, 1997 [sic 1998]
Greenville, SC

APPENDIX E — ORDER OF DESTRUCTION OF THE MAGISTRATE'S COURT OF SOUTH CAROLINA, GREENVILLE COUNTY IN *SC LAW ENFORCEMENT DIVISION v. 192 COIN OPERATED VIDEO GAME MACHINES, etc., et al.* DATED DECEMBER 31, 1997

IN THE MAGISTRATE'S COURT
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

SC Law Enforcement Division

Plaintiff

Vs.

192 Coin-operated Video Game Machines, Said Machines bearing serial numbers and ID numbers Listed on the attachment, being the property of Collins Entertainment Corporation located at 1341 Rutherford Road and the Brandon Mill Storage Facility

Defendants

ORDER OF DESTRUCTION

This matter comes before the Court pursuant to SC Code Ann. 12-21-2712 (Supp 1996) at the request of the South Carolina Law Enforcement Division, whose Agents seized the defendant's machines. These machines are now before the Court in order to determine if they are slot machines prohibited by the SC Code Ann. 12-21-2710 (Supp. 1996).

After carefully examining these machines, I find them to be slot machines. These machines register varying amounts

of winnings depending upon which combination of various symbols are displayed after a coin is inserted and a button is pushed. They require no skill to play. I have considered the Court's reasoning in State v. Four Video Slot Machines, __ SC __, 453 S.E. 2d 896 (1995), and State v. One Coin-Operated Video Game Machine, __ SC __, 467 S.E. 2d 443 (1996), as well as the 1993 amendments to Title 12 of the South Carolina Code concerning video games. I find and conclude that the defendant's machines are in violation of SC Code Ann. 12-21-2710 (Supp. 1996), and do hereby order their destruction. The defendant machines will be destroyed thirty (30) days after the date of this order.

AND IT IS SO ORDERED.

s/ Diane D. Cagle
Magistrate

This 31 day of December, 1997
Greenville, SC

APPENDIX F — LETTER OF THE SUPREME COURT OF SOUTH CAROLINA DENYING PETITION FOR REHEARING DATED MARCH 9, 2000

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL F. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, SC 29211
(803) 734-1080

March 9, 2000

Russell D. Ghent, Esquire
Leatherwood, Walker,
Todd & Mann
P O Box 87
Greenville, SC 29602

Re: State v. 192 Coin & SLED v. 23 Coin
98-CP-23-22

Dear Counsel:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s/ Ernest A. Finney, Jr. C.J.

s/ James E. Moore A.J.

s/ E.C. Burnett, III A.J.

Appendix F

Associate Jean H. Toal and
Associate Justice John H. Waller,
Jr., not participating.

March 9, 2000."

The remittitur in this matter is today being forwarded to the Clerk of Court for Greenville County.

Very truly yours,

s/ [illegible]
CLERK

DES/djp

cc: O. W. Bannister, Jr., Esquire
Mindy L. Hervey, Esquire
Robert M. Ariail, Esquire

APPENDIX G — AFFIDAVIT OF FRED COLLINS DATED FEBRUARY 6, 1998

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

CASE NO.: 98-CP-23-22

(Related proceedings in the
Court of General Sessions)

State of South Carolina,

Plaintiff,

vs.

Collins Entertainment Corporation,

Defendants.

AFFIDAVIT OF FRED COLLINS

Affiant being duly sworn avers and deposes as follows:

1. Affiant is President of Collins Entertainment Corporation and was President of said corporation prior to 1994 and thereafter.

2. After the decisions of the South Carolina Supreme Court in *State v. Four Video Slot Machines*, __ S.C. __, 453 S.E. 2d 896 (1995), and *State v. One Coin-Operated Video Machine*, __ S.C. __, 467 S.E. 2d 443 (1996), Affiant

contracted Solicitor Joseph Watson, Solicitor of the Thirteenth Judicial Circuit, and asked for clarification regarding storage of machines which had been declared as illegal to operate in South Carolina.

3. In my conversation with Solicitor Watson, I was advised by Solicitor Watson that it would be lawful to store the machines under South Carolina law so long as the machines were not used or operated in South Carolina.

Other specifics or details as recalled by the Affiant, if any:

Further Affiant sayeth not.

s/ Fred Collins
Fred Collins
President of Collins Entertainment Corporation

SWORN to before me this
6th day of February, 1998.

s/ Joanna H. Chandler (SEAL)
Notary Public for South Carolina
My commission expires: 2/25/01

Supreme Court, U.S.
FILED
AUG - 3 2000
CLERK

(2)

No. 99-1962

IN THE

Supreme Court of the United States

COLLINS ENTERTAINMENT, INC. and
192 COIN-OPERATED VIDEO GAME MACHINES, etc., *et al.*,

Petitioners,

v.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
and THE STATE OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. 192 coin-operated machines	1
B. 23 coin-operated machines	3
Reasons for Denying the Writ	5
I. The Petitioner Is Raising A Novel Argument, One That Was Not Raised At The Courts Below.	5
II. The Petitioner Was Afforded A Meaningful Opportunity To Be Heard.	7
III. The Post-Seizure Hearing Provided The Petitioner Satisfied Any And All Requirements Of Both The State And Federal Guarantees Of Due Process.	9
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Allen v. Tucker, 715 F. Supp. 266 (E.D. Mo. 1989) 6, 9

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 6, 9, 11

California Workers v. McElroy, 367 U.S. 886 (1961) 9

Gilbert v. Homar, 520 U.S. 924, 935 (1997) 7, 10

Goss v. Lopez, 419 U.S. 565 (1975) 10

Grannis v. Ordean, 234 U.S. 385 (1914) 9

Moore v. Timmerman, 276 S.E.2d 290 (1981) 6, 9

Myers v. Real Property at 1518 Holmes Street, 411 S.E.2d 209 (1991) 6, 9

Sentell v. R. Co. R., 166 U.S. 698 (1897) 6

State v. Four Video Slot Machines, 453 S.E.2d 896 (S.C. 1995) 2, 4

State v. Kizer, 162 S.E.2d 444 (1932) 6

State v. One Coin Operated Video Machine, 467 S.E.2d 443 (1996) 2, 4

Cited Authorities

Page

Wolf v. McDonnell, 418 U.S. 539 (1974) 10

Statute:

S.C. Code Ann. § 12-21-2710 ..... 1, 2, 3, 5

Rule:

Supreme Court Rule 10 (1999) 7

STATEMENT OF THE CASE

A. 192 coin-operated machines

On December 23, 1997, Special Agent Asbill of the South Carolina Law Enforcement Division, (hereinafter "SLED"), brought before Magistrate Diane Cagle affidavits which contained sworn statements that they had observed illegal gaming machines in two warehouses owned and operated by the petitioner, Collins Entertainment Inc. The affidavits included testimony of two agents of SLED, who had been contacted by a confidential informant stating that he had observed illegal gambling machines and devices at both locations. SLED agents, acting upon this information, went to 1341 Rutherford and Brandon Mills in an undercover capacity purporting to be buyers of gaming equipment. While at the both premises, the SLED agents observed for themselves that there was illegal gaming equipment, including gambling machines and their respective component parts in violation of S.C. Code Ann. § 12-21-2710, at both 1341 Rutherford and Brandon Mills.

Pursuant to these affidavits and the sworn testimony of Special Agent Asbill, Magistrate Diane Cagle issued search warrants for the premises located at 1341 Rutherford Road and the Brandon Mills Storage Facility. Upon issuance of the search warrants, agents of SLED executed the search warrants for the 1341 Rutherford and Brandon Mills premises and seized 192 coin-operated video machines property pursuant thereto. Magistrate Cagle then went to the two warehouses herself and examined the seized machines and their respective component parts and determined that such were in violation of S.C. Code Ann. § 12-21-2710. Specifically, Magistrate Cagle found that the machines

registered various amounts of winnings depending upon which combination of various symbols are displayed after a coin is deposited and a button is pushed. She further found that these machines required no skill on the part of the player or operator. Having determined that the machines were in violation of S.C. Code Ann. § 12-21-2710, Magistrate Cagle ordered their destruction. Her findings that the machines were in violation of § 12-21-2710 and required destruction were premised upon careful consideration of *State v. Four Video Slot Machines*, 453 S.E.2d 896 (S.C. 1995) and *State v. One Coin Operated Video Machine*, 467 S.E.2d 443 (1996).

The petitioner filed a notice of appeal and memorandum of law challenging the findings and order of Magistrate Cagle. The petitioner's appeal contained fifteen exhibits, including affidavits of three Collins employees, a letter from the previous Solicitor, and fifteen newspaper articles. The Honorable Judge Thomas Ervin heard extensive oral arguments from both the petitioner and Respondent at a hearing in January of 1998. During the oral argument, the petitioner made repeated reference to these exhibits including the sworn testimony and letter from the solicitor. There was no limitation placed on these exhibits and the petitioner was free to include the affidavits of other parties as well. On March 4, 1998, the Honorable Judge Thomas Ervin issued an order affirming the Magistrate's Order of Destruction and dismissing the Appellant's Appeal with Prejudice. (Trial Court's Order dated March 4, 1998). The trial court continued the stay of destruction pending the exhaustion of all appeals. (Trial Court's Order dated March 4, 1998).

B. 23 coin-operated machines

On January 14, 1998, agents with SLED seized 23 coin-operated machines pursuant to a search warrant issued on the same date. While executing a previously issued search warrant for 192 coin-operated machines to be found on the premises of 1341 Rutherford and Brandon Mills, agents with SLED found in plain view and in the same general area, 23 additional illegal coin-operated machines. In that the agents with SLED were lawfully on the premises consistent with the previous search and seizure warrant, the agents determined that there was sufficient time and opportunity to obtain an additional search warrant for the newly discovered 23 coin-operated machines.

The SLED agents went before Magistrate Etta Reid to secure an additional search warrant. The SLED agents presented Magistrate Reid with affidavits, which contained testimony that the agents, while lawfully on the premises to execute the previous search warrant, had personally observed the additional 23 illegal coin-operated machines to be on the property. Magistrate Reid issued a search warrant for the additional 23 illegal coin-operated machines; which set forth with the requisite specificity the premises to be searched and the property sought.

The machines were seized and brought before Magistrate Reid. Magistrate Reid closely examined the additional 23 machines and found them to be in violation of § 12-21-2710 and ordered their destruction. Specifically, Magistrate Reid set forth in her order of destruction that the 23 machines she examined register varying amounts of winnings depending upon which combination of various symbols are displayed after a coin is inserted and a button is

pushed. She further determined that the machines required no skill on the part of the player or operator. Magistrate Reid also considered and premised her decision on this Court's decisions in *State v. Four Video Slot Machines*, 453 S.E.2d 896 (1995) and *State v. One Coin Operated Video Machine*, 467 S.E.2d 443 (1996).

Both the Appellant and Respondent agreed that the issues raised in the appeal of the Magistrate Reid's order of destruction of the 23 coin-operated machines were substantially similar to those issues and raised on the appeal of the initial 192 coin-operated machines. Judge Ervin properly determined that the court need not hear any additional oral arguments concerning the appeal of the 23 coin-operated machines. The trial court then affirmed Magistrate Reid's Order of destruction on June 9, 1998 and dismissed the Appellant's appeal with prejudice. Again, the Court ordered the stay of the destruction of the machines pending the exhaustion of appeals.

The South Carolina Supreme Court granted the Appellant's Motion to Consolidate the appeals of the Orders of Destruction of the 192 and 23 coin-operated machines; to which the Respondent consented. The Supreme Court of South Carolina provided the petitioner with a second opportunity for hearing at which to present both oral and written argument to the court. After considering both written and oral argument, the South Carolina Supreme Court entered a judgment denying all seventeen issues raised on appeal by the petitioner on February 7, 2000. The Court then denied rehearing on March 9, 2000. The petitioner filed their writ of petition for certiorari on June 6, 2000.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER IS RAISING A NOVEL ARGUMENT, ONE THAT WAS NOT RAISED AT THE COURTS BELOW.

The petitioner presents the question of whether deprivation of property, without any opportunity to be heard, either before or after seizure, violates due process. The petitioner never raised such an issue, nor objected to such process, at the courts below. The sole due process issue presented by the petitioner at the state appellate court and the South Carolina Supreme Court was:

> Whether Appellant's right to the procedural due process guaranteed by the federal and state constitutions has been violated because no hearing was held *prior* to the issuance of the destruction orders.

Final Brief of the Appellant, p. 1. Thus, the substance of the petitioner's argument below was solely to challenge existing jurisprudence regarding whether the petitioner was entitled to a pre-seizure hearing.

At the courts below, the petitioner exclusively challenged the statutory design of S.C. Code Ann. § 12-21-2710's provision for a post-seizure hearing. Final Brief of the Appellant, p. 1. More specifically, the petitioner contested the legislature's policy considerations behind the post-seizure hearing provision of S.C. Code Ann. § 12-21-2710 as not being present when the nature of

contraband allegedly does not present the immediate threat to the public health and welfare. Final Brief of the Appellant, p. 10, *citing State v. Kizer*, 162 S.E.2d 444 (1932); and *Sentell v. R. Co. R.*, 166 U.S. 698 (1897). The South Carolina Supreme Court properly rejected this challenge affirming there is no due process violation to a statutory scheme providing for a post-seizure hearing involving illegal gambling machines which the legislature has determined do present an immediate and substantial threat to the public health and welfare. *See Moore v. Timmerman*, 276 S.E.2d 290 (1981); *Myers v. Real Property at 1518 Holmes Street*, 411 S.E.2d 209 (1991); *Allen v. Tucker*, 715 F. Supp. 266, 268 (E.D. Mo. 1989); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

The petitioner never questioned or otherwise objected to the discretionary nature of the post-seizure hearing which gives due deference to the magistrate's findings of fact regarding the illegality of the property in question. Final Brief of the Appellant, pp. 8-16. When the Honorable Judge Ervin duly informed the petitioner that the post-seizure hearing was not de novo and that the court would give due deference to the magistrate's findings, the petitioner raised no objection and failed to solicit the opportunity to present witnesses. Record on Appeal, p. 347. Accordingly, the South Carolina Supreme Court addressed the more limited question of whether the petitioner was entitled to a pre-seizure hearing in conformance with the requirements of due process. Appendix, pp. 22a-24a.

The petitioner, in no doubt recognizing that certiorari review of this well-established principle would meet with little success, has therefore modified its original argument of whether due process requires a either a pre-seizure or

post-seizure hearing including the de novo opportunity to present witnesses Therefore, the petitioner's issue is beyond consideration of this Court where it cannot be said that: "a state court of last resort has decided an important decided an important question of federal law;" because neither of the lower courts have decided this novel issue. *See* Supreme Court Rule 10 (1999). Where neither the intermediate appellate court nor the state court of last resort has addressed the particular aspect of the adequacy of the post-seizure hearing, due to the petitioner's failure to raise the issue, the Court should not consider the issue in the first instance on petition for certiorari. *Gilbert v. Homar*, 520 U.S. 924, 935 (1997).

II.

THE PETITIONER WAS AFFORDED A MEANINGFUL OPPORTUNITY TO BE HEARD.

The Supreme Court should deny the petition for certiorari where the petitioner was afforded a full and meaningful opportunity to be heard. The petitioner was granted a hearing by both the appellate court and the South Carolina Supreme Court. At both levels, the petitioner was afforded the opportunity to present both written and oral argument regarding the illegality of the machines, the orders of the magistrates, and the basis for returning the property to Collins Entertainment. (Record on Appeal, pp. 347-413). Additionally, the petitioner submitted numerous exhibits, including the sworn testimony of two Collins employees regarding the nature of the property and the circumstances surrounding the seizure. There was no limitation placed on the number of exhibits, the number of affidavits, nor the subject matter of the same. Thus, the petitioner should not

be permitted to question now that which it failed to proffer when provided the full and appropriate opportunity to do so.

Moreover, the petitioner's question of law regarding the opportunity to present testimony ignores the factual reality that there was no question regarding the illegality of the machines. The petitioner conceded the illegality of the machines in an affidavit by the owner of Collins Entertainment as noted by the South Carolina Supreme Court. *See* Appendix A, p. 23a; Record on Appeal, Affidavit of Freddie Collins, pp. 254, 255. In so doing, the petitioner acknowledged that there were no questions of fact about which to present factual testimony pertaining to the nature and operation of the machines. The petitioner consented that the only issues were questions of law regarding the actions of the magistrate, alleged violations of state and federal constitutional rights, any federal exemptions for the otherwise state prohibited property, and interpretation of South Carolina statutes governing the possession and operation of certain gambling machines.

Finally, the very nature of this proceeding, an *in rem* proceeding involving illegal gaming machines or contraband per se, contradicts any notions regarding the need for testimony where the nature of the contraband, its outward physical properties, are the sole question before court. *See* Appendix A, p. 12a. The petitioner's call for a hearing permitting the examining of witnesses is moot where there is no testimony or witnesses to proffer regarding the objective examination by the magistrate of the gaming machines. Indeed, even in the petition for certiorari, there is no proffer or extrapolation on the nature or subject of testimony, which the petitioner claims it was deprived of presenting. Thus, the Supreme Court should deny the petition for certiorari

where it raises a moot question of law pertaining to a non-contested question of fact.

III.

THE POST-SEIZURE HEARING PROVIDED THE PETITIONER SATISFIED ANY AND ALL REQUIREMENTS OF BOTH THE STATE AND FEDERAL GUARANTEES OF DUE PROCESS.

The petitioner was afforded two opportunities, at the intermediate appellate level and at the state court of last resort to raise any issues contesting the seizure and order of destruction of the illegal video gaming machines. The petitioner raises anew the objection that because there was no opportunity to present witnesses, there has been some violation of the federal and state guarantees of due process. However, the petitioner has failed to demonstrate how the guarantees of due process require the opportunity to examine any such witnesses.

Due process clearly requires notice and opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385 (1914). How much notice and what opportunity must be afforded is a balancing decision to made by the court based upon the competing interests involved and the likelihood that error has been made. *California Workers v. McElroy*, 367 U.S. 886, 895 (1961). Repeatedly, courts have held that a post-seizure hearing adequately affords a property owner the requisite due process. *See Moore v. Timmerman*, 276 S.E.2d 290 (1981); *Myers v. Real Property at 1518 Holmes Street*, 411 S.E.2d 209 (1991); *Allen v. Tucker*, 715 F. Supp. 266, 268 (E.D. Mo. 1989); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The specific question

raised by the petitioner is whether the hearing must afford the opportunity to examine witnesses.

Unfortunately, the cases relied upon by the petitioner simply fail to substantiate any constitutional mandate for an opportunity permitting the examining of witnesses. In *Gilbert v. Homar*, cited by the petitioner, the Court merely held that prior to suspending an officer, the officer must be afforded notice and a post-suspension hearing at which time the officer could contest the charges against him. 520 U.S. 924 (1997). Petitioner's reliance on *Wolf v. McDonnell* is further misplaced where it merely states that prison boards seeking to deprive a prisoner of good time credit, could, if security measures permitted, allow the prisoner the privilege to present witnesses if so indicated by the evidence. 418 U.S. 539, 565 (1974). Despite the citations of the petitioner, the *Wolf* Court specifically held that the mandates of due process do not require an opportunity to examine witnesses, nor the opportunity to confront or cross-examine witnesses. *Id.* Similarly, in the case of *Goss v. Lopez*, also relied upon by the petitioner, the Court stopped short of mandating that the suspended student be afforded a trial like process involving counsel, examining witnesses, and cross-examining accusers. 419 U.S. 565 (1975). Instead, the *Goss* Court deferred to state and local governments to establish procedures affording the student the requisite notice and opportunity to be heard commensurate with the nature and duration of suspension, which may, but need not include the examining of other witnesses. *Id.* Thus, the jurisprudence relied upon by the petitioner fails to substantiate the claim that due process mandates that an opportunity to be heard involve the opportunity to present witnesses. Instead, existing case law merely indicates in dicta that in some types of proceedings, due process may need extend the privilege of examining

witnesses where necessary to resolve certain issues subject to mischaracterization and error.

In the case sub judice, the opportunity to present witnesses is not intrinsic to nature of the hearing regarding the illegality of the contraband per se. The illegality of the contraband was properly determined by the physical characteristics of the machines as examined by the magistrate, consented to by the owner of the property submitted in an affidavit of the owner and petitioner, Freddie Collins, and not a subjective issue subject to frequent error or mistake. The issue may be different in the instance of derivative contraband where the owner of the property may require the opportunity to present evidence and testimony demonstrating to the court that the owner was not aware that the derivative contraband was being utilized in illegal activity. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In contrast, where the contraband at issue is illegal narcotics, weapons, gaming equipment, or contaminated food, such that the physical nature of the contraband can be readily determined by an objective examiner, there is no need for superfluous testimony.

Therefore, factual testimony regarding the physical aspects of contraband per se will likely add little to the hearing nor be necessary to evaluate the objective determination by the magistrate that the property is illegal. Accordingly, due process does not mandate that in a hearing contesting the seizure and destruction of contraband per se, the petitioner be afforded an opportunity to examine witnesses.

In all instances cited by the petitioner, the United States Supreme Court has deferred to lower courts, state

legislatures, prison boards, and school disciplinarians to establish a procedure where the opportunity to present witnesses is a privileged extended by the adjudicator when mandated by the facts and circumstances of the case. This Court should again defer to the lower courts and state legislatures to similarly establish procedures regarding the necessity of an opportunity to present witnesses at a hearing involving the seizure and destruction of contraband per se.

CONCLUSION

For the reasons cited, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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